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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 356

In re. ESTATE OF RAYMOND B. TRIPP, Deceased

WILLIAM A. TRIPP,
Petitioner,

vs.

IRENE F. TRIPP,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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CONTENTS

	Page
Index of Cases	iii
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provision and Statutes Involved	4
Statement of the Case	9
Argument	12
Conclusion	19
Appendix A—Opinion of the Supreme Court of South Carolina	1a-10a

INDEX OF CASES CITED

Burbank v. Ernst, 232 U.S. 162, 58 L. Ed. 551, 34 S. Ct. 299	19
Calvin v. Jones, 194 Mich. 670, 161 N.W. 847	19
Covey v. Somers, 351 U.S. 141, 100 L. Ed. 1021, 76 S. Ct. 724	14
Crane's Estate, In re, 205 Mich. 673, 172 N.W. 584	19
Frey, In re Estate of, 139 Ohio St. 354, 40 N.E. (2d) 145	15
Hammer, In re Estate of, 99 Ohio App. 1, 130 N.E. 437	15
Hanson v. Denckla, 357 U.S. 235, 2 L. Ed. (2d) 1283, 78 S. Ct. 1228	18
Hines v. Cowles, 18 Ohio Cir. Ct. (N.S.) 518; affirmed 86 Ohio St. 350	14
Morton v. Pettit, 124 Ohio St. 241, 177 N.E. 591	15

Page

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 ..... 12, 13, 14
Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565 13
Phillips v. South Carolina Commission, 195 S.C. 472, 125 S.E. (2d) 13 18
Riley v. New York Trust Co., 315 U.S. 343, 86 L. Ed. 885, 62 S. Ct. 608 ..... 18, 19
Scripp v. Wayne Circuit Judge, 131 Mich. 265, 90 N.W. 1061 14
Stacey v. Cunningham, 69 Ohio St. 176, 67 N.E. 292 .. 10, 15
Texas v. Florida, 306 U.S. 398, 83 L. Ed. 817, 59 S. Ct. 563 18
Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897 .. 16
Walker v. City of Hutchinson, Kansas, 352 U.S. 112, 1 L. Ed. (2d) 178, 77 S. Ct. 200 14

STATUTES CITED

28 U. S. C. A., Section 1257(3) 2
United States Constitution, Fourteenth Amendment 4
Ohio Revised Code, (2107.11-13; 2741.01-09) 4, 5, 6, 7
South Carolina Code (19-255; 19-286) 8

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William A. Tripp hereby respectfully petitions your Honorable Court for allowance of a Writ of Certiorari to review the judgment of the Supreme Court of South Carolina entered June 1, 1962 affirming an order of the Court of Common Pleas for Spartanburg County, South Carolina, which had affirmed an order of the Probate Court of Spartanburg County, South Carolina and in support thereof submits the following data:

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina filed June 1, 1962 does not appear to be reported in the South Carolina Reports but is reported in 126 S. E. (2) 9. A copy of the same is in the Appendix hereto at page 1a.

The opinion of the Court of Common Pleas does not appear to be reported. A copy is in the Record, page 31.

The opinion of the Probate Court similarly does not appear to be reported. A copy, likewise is in the Record, page 35.

JURISDICTION

The opinion and decision of the Supreme Court of South Carolina was entered June 1, 1962. The statutory provision believed to confer on this court jurisdiction to review the decision in question by writ of certiorari is 28 U.S.C.A. Section 1257 (3).

QUESTIONS PRESENTED

1. Does the Ohio Probate Code which states that a probate court proceedings admitting a will to probate in Ohio does not require notice of such proceedings to a known non resident heir (petitioner) whose residence was known by the will proponent (respondent) deprive petitioner of due process of law guaranteed by the Fourteenth Amendment in that petitioner does not have an opportunity to object to jurisdiction of the Ohio Probate Court over both the person and subject matter?

2. Does the fact that the Ohio Probate Code (Section 2107.23) permitting within six (6) months an adversary proceeding to contest a will only in a Common Pleas court action in which the contestant by so doing must admit the jurisdiction of the Ohio Probate Court's order admitting the will to probate further deprive petitioner of due process under the Fourteenth Amendment when the South Carolina Supreme Court declares that the expiration of such six (6) month period under the Ohio statute precludes any further inquiry into not only the jurisdiction of the Ohio probate court, but also any question of mental capacity or other ground attacking the will in a pending South Carolina probate proceeding attacking the domicile of decedent as claimed by respondent and his mental capacity to make a will?

3. Where the *ex parte* record of the Ohio Probate Court admitting the will in question fails to establish either the domicile of decedent or ownership of property in Ohio by decedent and the Supreme Court of South Carolina affirms the Ohio Probate Court is not petitioner being deprived of his property without due process of law as guaranteed by the Fourteenth Amendment in that he is prevented from showing that (1) the Ohio Probate Court Order is void and a nullity for lack of jurisdiction of both subject matter and person under the Ohio law and (2) that South Carolina was the domicile of decedent for proper administration of his estate?

4. Has the South Carolina Supreme Court in granting full faith and credit to the Ohio Probate Court order deprived petitioner of his property without due process of law contrary to the Fourteenth Amendment in that the Ohio court did not have jurisdiction *in personam* over petitioner, an indispensable party to the proceedings?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. *Constitutional Amendment Involved: Fourteenth Amendment*

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Statutes involved:

a. The following are sections of the Revised Code of Ohio:

> *"2107.11 (10504-15). Jurisdiction to probate.*
>
> A will shall be admitted to probate:
>
> (A) In the county in which the testator was domiciled if, at the time of his death, he was domiciled in this state;
>
> (B) In any county of this state where any real or personal property of such testator is located if, at the time of his death, he was not domiciled in this state, and provided that such will has not previously been admitted to probate in this state or in the state of such testator's domicile.
>
> For the purpose of this section, intangible personal property is located in the place where the instrument evidencing a debt, obligation, stock, or chose in action is located or if there is no such instrument where the debtor resides.

2107.12 (10504-16). Contest of jurisdiction.

When a will is presented for probate, persons interested in its probate may contest the jurisdiction of the court to entertain the application. Preceding a hearing of a contest as to jurisdiction, all parties named in such will as legatees, devisees, trustees, or executors shall have notice thereof in such manner as may be ordered by the court.

When such contest is made, parties may call witnesses and shall be heard upon the question involved. The decision of the court as to its jurisdiction may be reviewed on error.

2107.13. Notice of probate.

No will shall be admitted to probate without notice to the surviving spouse and to the persons known to the applicant to be residents of the state who would be entitled to inherit from the testator under sections 2105.01 to 2105.21, inclusive, of the Revised Code, if he had died intestate. Notice need not be given to any person who would be entitled to inherit from the testator solely by reason of relationship to a deceased spouse of the testator.

2741.01. Contest of will or codicil.

A person interested in a will or codicil admitted to probate in the probate court, or court of common pleas on appeal, may contest its validity by a civil action in the court of common pleas of the county in which such probate was had.

2741.02. Necessary Parties.

All the devisees, legatees, and heirs of the testator, and other interested persons, including the executor or administrator, must be made parties to an action under section 2741.01 of the revised Code.

2741.03. Certification to Probate Court.

Upon the filing of the petition in an action under section 2741.01 of the Revised Code, the clerk of the court of common pleas shall certify that fact to the probate court in which it is recorded.

2741.04. Issue triad by Jury; allowance of attorney fees; order certified to probate judge.

In an action under section 2741.01 of the Revised Code, an issue must be made up, either by pleadings or an order on the journal whether or not the writing produced is the last will or codicil of the testator, which issue shall be tried by a jury. The verdict shall be conclusive unless a new trial is granted, or the judgment is reversed or vacated. When the jury finds that the writing produced is not the last will and testament or codicil of the testator, the trial court shall allow as part of the costs of administration such amounts to the fiduciary and to the attorneys defending such purported last will or purported codicil, as in the opinion of the trial court are reasonable compensation for the services rendered in such contest. The court shall order such amounts to be paid out of the estate of the decedent, whose purported last will or purported codicil was contested. A copy of such order shall be certified to the probate court by the clerk of the court of common pleas and the probate judge shall include the amount so certified in the costs of administration.

2741.05. Order of probate is prima-facie evidence.

On the trial of the issue made up as provided in section 2741.04 of the Revised Code, the order of probate is prima-facie evidence of the attestation, execution and validity of the will or codicil.

2741.06. When the testimony upon the probate is competent.

In an action to contest the validity of a will or codicil admitted to probate, a certified copy of the testimony of such of the witnesses examined upon the probate of such will or codicil as are out of the jurisdiction of the court of common pleas, dead, or since the probate have become incompetent shall be admitted in evidence on the trial.

2741.07. Conduct of the trial.

The party sustaining the will shall be entitled to open the evidence and argument in an action under section 2741.01 of the Revised Code. He must offer the will and probate, and rest. The opposite party then shall offer his evidence. The party sustaining the will then must offer his other evidence. Rebutting evidence may be offered as in other cases.

2741.08. Appeal.

No appeal on questions of law and fact can be taken from the judgment of the court of common pleas to the court of appeals in cases to contest a will, but the right to appeal on questions of law shall be the same as provided in other cases brought in such court.

2741.09. Limitation of action to contest will.

An action to contest a will or codicil shall be brought within six months after it has been admitted to probate, but persons under any legal disability may bring such action within six months after such disability is removed. The rights saved to persons under disability shall not be effective as against a bona fide purchaser for value, a fiduciary who has acted in good faith, or a person delivering or transferring property under authority of a will to an appointed fiduciary or to any person.

b. The following sections are from the South Carolina Code:

19-255 *Due form of law:*

Probate in common form shall be good unless some person interested to invalidate any such paper as a will shall give notice to the judge of probate within six months next after such probate or, if such party interested therein be subject at the time of probate in common form to the disability of infancy, within six months next after such disability be removed that he doth require it to be proved in due form of law, which is as follows: the judge of probate shall require the party producing the will for probate to prefer a petition in writing, praying to be permitted to swear and examine witnesses upon the same, for the publishing or confirming thereof, and thereupon all such persons as would have been to distribution of the estate if the deceased had died intestate shall be summoned to answer the petition, in like manner as if provided for the summons of parties to civil actions in the courts of common pleas; whereupon the judge of probate shall after swearing all the subscribing witnesses to the same proceed to examine severally and to take down in writing such depositions of other witnesses as are made for or against the confirmation of the will upon all matters touching its legal validity or formal execution; and, in case the proof be sufficient, he shall by his decree, pronounce for the validity of the will.

19-286. *Foreign probates admitted to probate upon exemplification.*

If a will be regularly proved in any foreign court an exemplification of such will may be admitted to probate in this State upon the exemplification and certificate of the judge of the court of probate and the exemplification shall also be evidence of the de-

vise of lands in this State when the title of land comes in question: Provided, that if the will be not proved in solemn form the parties interested against the will shall not be concluded by such probate but may examine witnesses as to the sanity of the testator or as to any fraud or imposition practiced upon him in obtaining the will and the other side may apply for an order to perpetuate testimony in support of the will.

STATEMENT OF THE CASE:

Petitioner's father, Raymond B. Tripp, died April 9, 1959 in a Tryon, North Carolina hospital to which he had been moved from his house in Spartanburg County, South Carolina.

On April 30, 1959 Respondent, widow of decedent, applied in Cuyahoga County Probate Court of Ohio for probate of the alleged will of decedent reciting decedent was "late a resident of the City of Cleveland" (ff. 44). The probate court admitted the will to probate on May 14, 1959 by an *ex parte* order reciting decedent was a resident of Cuyahoga County or owned property in said county (ff. 59-60).

No notice was sent or required under Ohio law to be sent to petitioner, a known non resident heir residing in Michigan, of the probate proceedings in Ohio (f. 18). Subsequent to the order admitting the will petitioner learned about the admission of a will by the probate court leaving all of decedent's property to his widow. Petitioner was advised that to contest the will he had to bring an action in the Ohio Common Pleas Court within six months of the Probate Order admitting the will. However, if he did this

he must admit the jurisdiction of the Ohio Court to probate the will. *Stacey v. Cunningham*, 69 Ohio St. 175, 67 N. E. 892.

Since petitioner contended that South Carolina and not Ohio was the state of his father's domicile, petitioner filed an exemplified copy of the alleged will in the Ohio proceedings, in the Probate Court for Spartanburg County, South Carolina under the provisions of Section 19-255 of the South Carolina Code. On March 8, 1961 the South Carolina Probate Court determined it would grant ancillary administration on proper application but would not entertain a will contest in South Carolina because the Ohio decree allowing the will is conclusive (ff. 135-137). This refusal of the South Carolina probate court to question the jurisdiction of the Ohio probate court to bind petitioner was affirmed on appeal by the Common Pleas Court for Spartanburg County (ff. 138-160) and also the Supreme Court of South Carolina.

The undisputed facts bearing on the question of jurisdiction of both Ohio and South Carolina Courts, which the Supreme Court of South Carolina has disregarded in its decision depriving petitioner of property rights without due process of law, are as follows (ff. 86-103):

About 1948 decedent and his then wife, Nelie Tripp, were not in good health and decided to sell their home in Chagrin Falls, Ohio, consisting of 22 acres of land with two houses and some stables. Both desired a milder climate in which to live and for him to retire. They made trips to Arizona, Florida, and the Carolinas, to find a suitable site and climate, and as a result they bought 225 acres in South Carolina, near Tryon, North Carolina, of unimproved land. Decedent spent in excess of $50,000.00 constructing a 9 room house on the property and making other improvements.

They also sold the Chagrin Falls property in Ohio. It was completed in 1953 and decedent lived there with his former wife until she died in February 8, 1957. The real estate was in her name and passed to decedent by her will. Decedent continued to use this residence as his home until he died and when he married Respondent on November 2, 1957 she joined him and continues to reside there now.

During all these years Decedent was connected with the Ohio Forge and Machine Corp. of Cleveland, Ohio and at time of his death was still an official with the company, although his last illness restricted his activity with the company. After selling his Chagrin Falls property, he maintained temporary quarters at Hillbrook Club, Novelty, Ohio and Essex House in Cleveland, Ohio. Then he and Respondent occupied temporary quarters in The Ambassador Apartments, 13700 Fairhill Road, Shaker Heights, Ohio which tenancy was terminated by Decedent and Respondent on March 11, 1959, the same day the Decedent executed his will leaving all his property to Respondent (ff. 109, 43). Thereafter Decedent had no residence of any kind in Cuyahoga County, Ohio (f. 109). Three days later Decedent purported to convey the real estate in South Carolina to Respondent for no consideration (f. 178).

The Federal questions were raised in the first instance by petitioner in the Probate Court of Spartanburg County upon arguing the motion of Respondent to dismiss the proceeding (ff. 7-10).

The same federal questions were raised on appeal in the Common Pleas Court which heard the matter *de novo* (ff. 135-160). Then the same federal questions reviewed in the Supreme Court of South Carolina were raised by Exceptions (Nos. 7, 8, 9, 12, 13, 15 and 16) in accordance with the

rules of that Court (ff. 168, 170, 175, 176 and 179). The Supreme Court of South Carolina passed upon these Exceptions on pages 3 to 6 of the opinion by affirming the decision of the Ohio Probate Court as final and not open to any question of jurisdiction.

ARGUMENT

1. Petitioner is deprived of property rights without due process of law in that the Ohio Probate Code (2107.11-13) does not provide for any notice to a non-resident heir whose address is known in an ex parte proceedings admitting a will to probate in Ohio as required by the rule for minimum notice to interested parties in a probate proceeding established in Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 94 L. Ed. 865, 70 S. Ct. 652.

Section 2107.13 of the Ohio Probate Code (f. 18) expressly states no notice of any kind need be given to a non-resident heir even though his address is known. Petitioner, a son of the deceased, is an heir under the Ohio law (f. 45) whose right to inherit has been taken from him through decedent's alleged will leaving all his property to Respondent. This can not be done under the Due Process Clause of the Federal Constitution without making him a party to the method of probating the Will.

The United States Supreme Court has designated the use of the United States mail as a proper means of serving notice of process upon non residents whose whereabouts are known and where the res is within the Court's jurisdiction. Petitioner contends that the Ohio Probate Court failed to obtain jurisdiction for any purpose binding upon

petitioner, because service of process on him was not required and was not made in such a manner as to satisfy the due process clause of the United States Constitution.

The South Carolina Supreme Court states petitioner had actual notice of the Ohio proceedings but fails to show in the record how and when it was obtained. Actually, petitioner can show he learned of the proceedings only *after* the Ohio Court order admitting the will to probate had been entered. The Supreme Court then goes on to discuss the constitutional question, stating it is not necessary anyway to notify possible contestants in advance of probate (5). But the overlooked what the Mullane case states on p. 1652 is the fundamental requirement of due process i.e. that in any proceeding which is to be accorded finality there must be notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Such notice was not received by the petitioner, William B. Tripp.

The Supreme Court of the United States has the final say as to whether or not any state procedure complies with the due process clause. No state court is bound by the decisions of another state court which conflict with the United States Supreme Court's holding on the subject. The field has been well covered and the proper course for the state courts to follow has been well charted. Fundamentally, the court must have jurisdiction of both the subject matter and the parties to be bound. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565. Before the rights of parties can be determined, they must be brought before the court by proper process or notice or through voluntary appearance.

The question of proper notice for all types of cases presents some practical problems. That is why the United

States Supreme Court has approved in certain cases publication as a customary substitute where the residence of interested parties are unknown. But non resident parties whose post office address is known places notice by publication on a different footing. Service of notice or process by United States mail is necessary to apprise the interested party whose property rights may be affected by the pendency of the probate action according to the rule of the Mullane case.

Later cases of the United States Supreme Court have cited with approval the doctrine of the Mullane case on the question of notice. They are *Covey v. Somers*, 351 U. S. 141, 100 L. Ed. 1021, 76 S. Ct. 724 and *Walker v. City of Hutchinson, Kansas*, 352 U. S. 112, 1 L. Ed. (13) 178, 77 S. Ct. 200.

Clearly and without any doubt whatever, the United States Supreme Court says the law to be that any Probate Code which does not provide for actual service of process upon all parties including non residents of the state whose property rights are affected thereby and whose whereabouts are known, does not meet the Due Process Clause of the Federal Constitution. To obtain due process the use of the United States mails is required for reasonable and adequate notice to such parties where the res is within the Court's jurisdiction. Measured by such law, the Ohio Probate Code lacks the essential of service of process on non residents, and therefore, has no jurisdiction beyond the courts of its own state. See *Hines v. Coules*, 18 Ohio Cir. Ct. (N. S.) 518; affirmed 86 Ohio St. 350; and *Scripp v. Wayne Circuit Judge*, 131 Mich. 265, 90 N. W. 1061.

2. Section 2107.23 of the Ohio Probate Code permitting a will contest only in the Common Pleas Court within six (6) months after the Ohio Probate Court has admitted the will to probate and requiring the contestant to admit the jurisdiction of the probate court in such proceeding further deprives the contestant of property rights without due process of law under the Fourteenth Amendment.

This provision of the Ohio Code requires a separate suit be started within 6 months from the admission of a will to probate. The validity of any will cannot be determined in the probate court. As a result of this statute the Ohio courts have interpreted its meaning to require the contesting party to admit the jurisdiction of the probate court. *Stacey v. Cunningham*, 69 Ohio St. 176, 67 N. E. 292; *In re Estate of Hammer*, 99 Ohio App. 1, 130 N. E. 437. Furthermore, after the six month period has expired the probate court is powerless to vacate its order admitting the will even if it is conclusively shown to be spurious. *Morton v. Pettit*, 124 Ohio St. 241, 177 N. E. 591.

It thus becomes apparent that a non resident heir would have to waive any jurisdictional question if he learned about the will subsequent to its entry by the probate court and he wanted to protect his right to attack the validity of the will or mental capacity of the testator in a will contest in Ohio. Even if he had appeared in the probate court and appealed to the Supreme Court of Ohio on the question of domicile, during which time more than 6 months elapsed, he then would have to forego contesting the will. Hence, under the circumstances he finds the Ohio Probate Code requires him either to abandon the jurisdictional question or the right to contest the validity of the will in the Common Pleas Court. Petitioner contends this is not due process under the Fourteenth Amendment. *In re Estate of Frey*, 139 Ohio St. 354, 40 N. E. (2) 145.

3. Since the record of the Ohio Probate Court is void of any evidence or finding of the domicile of decedent, the South Carolina Probate Court has authority to determine this jurisdictional fact in its proceedings instituted by petitioner.

Aside from the question of notice and service of process, a review of the Ohio Probate Court record shows that it never did pass upon the question of domicile (ff. 44, 59). The record of a judgment rendered in another State may be attacked to show that the facts in such record do not give the court jurisdiction. If it be shown that such facts did not exist, the record is a nullity. Lack of jurisdiction as to either subject matter or person can be shown in any court. *Thompson v. Whitman* (1874), 18 Wall. 457, 21 L. Ed. 897.

Ohio Code Section 2107.11, A and B, governs the court's jurisdiction to probate wills. Only when the decedent at time of his death was domiciled in Ohio or owned property in Ohio may the probate court take jurisdiction for any purpose. The record shows that no facts on either of the subjects were presented to the court at the time probate proceedings were instituted or before the order of probate was entered. The petition to probate the will is silent on both subjects and the record shows that no other pleadings were filed in the case, setting up these jurisdictional facts. So we have the record of an Ohio probate court showing that, under its own code, the court failed to obtain jurisdiction to probate the will and the courts of South Carolina are being told that they are bound by such order of probate.

Petitioner contends further that the record establishes conclusively that South Carolina, not Ohio, was decedent's state of domicile at the time of his death. A review of the uncontroverted facts in this case clearly show that, despite

a recital of residence in the will prepared by decedent's attorney to support Respondent's argument, South Carolina was the true domicile of decedent.

It was in South Carolina that decedent and his former wife had built a home to which they moved when he was seeking retirement and she was looking for a climate that would be good for her arthritis. It was in the South Carolina home that he and his former wife were living when she died in 1957. It was to the South Carolina home that he brought his last wife (and present widow) when they were married a few months later. He joined three clubs near his South Carolina home. He spent 80% of his weekends at his South Carolina home during the last two or three years of his life, his wife remaining in South Carolina almost continuously. It was from his South Carolina home that he was taken to a nearby hospital in his final illness to die.

It was his business interests alone that required decedent to spend part of his time in Ohio. He did not vote there in 1956 or subsequently. He kept a furnished apartment in Cleveland, but he surrendered this apartment and moved his furniture out the very day he made his will almost a month before his death. From that time on, he had no home of any kind in Ohio, and never returned to Ohio. There must have been no other Ohio residence, for when the widow applied for administration in Ohio, she gave as her address the same apartment which decedent had surrendered over six weeks before, regardless of the fact that she had participated in the acts of surrender. It is absurd on its face to say that Decedent's "true, fixed and permanent home" at the time of his death was an apartment which had been surrendered some weeks earlier, from which Respondent had moved their belongings, and which, in all probability, was then occupied by strangers.

The record discloses that decedent was not physically present in Ohio when he made the will (f. 54), nor at any time after he surrendered his apartment and Respondent moved his furniture therefrom. Since residence in fact is a necessary element to establish domicile, there could be no domicile in Ohio because of a lack of any residence in Ohio at the time of his death. *Texas v. Florida*, 306 U. S. 398, 83 L. Ed. 817, 59 S. Ct. 563 and *Phillips v. South Carolina Commission*, 195 S. C. 472, 125 S. E. (2d) 13. Petitioner contends that his actions show conclusively that his home was South Carolina at the time of his death. To refuse petitioner an opportunity in court to show the domicile of decedent and that the will was void because of undue influence or lack of mental capacity is to deprive him of his property rights without due process of law contrary to the Fourteenth Amendment.

4. It is a denial of due process under the Fourteenth Amendment for the South Carolina Courts to grant full faith and credit or recognize on the ground of comity the Ohio Probate Court order as conclusive where there is a lack of jurisdiction of both the person and subject matter involved.

A state is under no obligation to give full faith and credit to a judgment of a sister state which is invalid in the state where rendered because offensive to the due process clause of the Fourteenth Amendment. *Hanson v. Denckla*, 357 U. S. 235, 2 L. Ed. (2d) 1283, 78 S. Ct. 1228. State courts could refuse full faith and credit to judgments entered by courts that were without jurisdiction over non resident defendants even prior to the passage of the Fourteenth Amendment. *Riley v. New York Trust Co.*, 315 U. S. 343, 86 L. Ed. 885, 62 S. Ct. 608.

In states where the jurisdiction to probate wills depends upon the domicile of the deceased at the time of his death, the finding of the Probate Court that such domicile was in its state is not binding upon the probate court of another state where the probate of the same will is sought. *Hasbanh v. Ernest*, 232 U. S. 162, 58 L. Ed. 551, 34 S. Ct. 290; *Riley v. New York Trust Co.*, *supra*; *Calvin v. Jones*, 194 Mich. 670, 161 N. W. 847; and *In re Crane's Estate*, 205 Mich. 673, 172 N. W. 584. It is submitted that the evidence conclusively establishes South Carolina, not Ohio, as the state of decedent's domicile at the time of his death. The findings of the lower courts as affirmed by the South Carolina Supreme Court to the contrary are not supported by the record. To deny petitioner the right to establish Ohio's lack of jurisdiction over his person as well as the subject matter of domicile is not due process of law and therefore cannot be sustained under the full faith and credit clause of the U. S. Constitution or the doctrine of comity as a substitute for due process.

CONCLUSION

Petitioner respectfully requests this Honorable Court grant a writ of certiorari because the South Carolina Supreme Court has rendered an opinion based upon an Ohio statute which is contrary to the due process clause of the Fourteenth Amendment and in particular contrary to the rule of reasonable notice to non-resident heirs in a probate proceeding established by this court in the *Mullane* case, *supra*. Further, the South Carolina courts have refused to recognize the jurisdictional question attacking the domicile of decedent in Ohio as raised in the South Carolina Probate Court. By such a decision, South Carolina has

denied petitioner the right to show a complete lack of jurisdiction of the subject matter as well as the person in Ohio. Under the circumstances, the South Carolina Probate Court should be instructed to take jurisdiction of the estate and proceed independently of the Ohio court to determine the domicile of decedent and the validity or non validity of the will of the Decedent, Raymond B. Tripp.

Respectfully submitted,

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APPENDIX A

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

William A. Tripp, Appellant,
v.
Irene F. Tripp, Respondent

Appeal from Spartanburg County
Bruce Littlejohn, Judge

Case No. 4825
Opinion No. 17919
Filed June 1, 1962

AFFIRMED

Holcombe & Bomar, of Spartanburg; Griffin, Seely, Boyer & Gilleo, of Detroit, Michigan; and Diehm & Farber, of Cleveland, Ohio, for appellant.

Harvey W. Johnson and James B. Stephen, both of Spartanburg, for respondent.

LEGGE, ACTING ASSOCIATE JUSTICE: This in an appeal from an order of the Court of Common Pleas for Spartanburg County affirming an order of the Probate Court which, upon a special appearance to contest its jurisdiction to require proof in solemn form of the will of Raymond B. Tripp, deceased, accepted jurisdiction for the purpose of granting ancillary administration, but held that the prior probate in Ohio was conclusive and barred contest of the will in South Carolina.

The decedent, executive vice-president and sales manager of Ohio Forge and Machine Corporation of Cleveland, Ohio, died on April 9, 1959, at the age of sixty-seven, in a hospital in Tryon, North Carolina. On March 11, 1959, while a patient in that hospital, he had executed a will purporting to leave his entire estate to his wife, Irene F. Tripp, respondent here, and appointing her as executrix. In the preamble to the will, he referred to himself as "of Cuyahoga County, State of Ohio, temporarily residing in Spartanburg County, State of South Carolina." Five days after the execution of this will, the decedent had executed a deed purporting to convey to his said wife certain real estate in Spartanburg County, which comprised the bulk of his property. At the time of his death he owned personal property in Ohio, consisting principally of stock of Ohio Forge and Machine Corporation; and he owned also certain personal property in South Carolina.

Respondent probated the will in Cuyahoga County, Ohio. Appellant, decedent's son by a former marriage, residing in Michigan, was given no formal notice of the Ohio probate proceedings, but had actual knowledge of their pendency. After the expiration of the statutory period for the filing of a will contest in Ohio, he called upon respondent to file the will for probate in South Carolina. This request having been ignored, he filed an exemplified copy of the will in the Probate Court of Spartanburg County, and it was there admitted to probate in common form on October 15, 1959. On the same day, he gave notice, Code, 1952, Section 19-255 as amended, that he required it to be proved in due form of law; whereupon the Judge of Probate, pursuant to that statute, cited the respondent to prefer a petition to prove the will in due form of law. Respondent thereupon appeared specially to contest the jurisdiction of the court to require such proof, upon the ground, among others, that under the laws of Ohio the probate there had become conclusive upon the expiration of six months following such probate. This contention was sustained by the Probate Judge, whose judgment was affirmed by the order of the circuit court from which this appeal is taken.

The following questions are presented:

1. Is the attack upon the will foreclosed by Section 19-286 of the 1952 Code?

2. Does the probate code of Ohio violate the due process clause of the Federal Constitution?

3. Did the lower court improperly make findings of fact with reference to decedent's real estate and with reference to an action pending to set aside his deed conveying to respondent his real estate in South Carolina?

Section 19-286, after declaring that an exemplification of a will that has been regularly proved in any foreign court may be admitted to probate in this state, provides "that if the will be not proved in solemn form the parties interested against the will shall not be concluded by such probate * * *." Whether the words "such probate" in the proviso just quoted refer to the foreign probate or to the probate by exemplification in this state would appear at least debatable, in view of the fact that in some states, Ohio among them, there is no procedure such as ours for proof in solemn form. That reference as to the foreign probate is suggested by the dictum in Collins v. Collins, 219 S. C. 1, 63 S. E. (2d) 811, where this court, discussing Section 19-286 (then Section 8936 of the 1942 Code), said that "the statute clearly contemplates, certainly as to personal property situated in this state, that if a foreign will has been proved in solemn form in the courts of decedent's domicile, such an adjudication would be conclusive here". Actually, the question suggested above is not before us in the case at bar, both parties relating the proviso to the foreign probate. Appellant contends that it should be literally interpreted, and that therefore the Ohio probate, being only in common form, is not conclusive. Respondent contends that it should be construed so as to effectuate its only reasonable purpose, i. e., to sanction a contest in this state of a will probated elsewhere so long as by the laws of the foreign state the will may still be contested, but not thereafter.

Respondent's construction of Section 19-286 was sustained by both the probate court and the circuit court, and correctly so in our opinion. To construe it literally would lead to the conclusion that contest in this state as to the validity of a will originally probated in another state and probated here by exemplification may be barred only by probate in solemn form in the state of original probate. No sound reason is suggested for discrimination in favor of states having a "solemn form" procedure and against those that do not; nor does any such reason appear for permitting such a contest here after the expiration of the time limited by the laws of the foreign state for contesting the will there, either by "solemn form" procedure or otherwise. In South Carolina, proof in solemn form is the only positive procedure whereby a will, probated here, may attain immunity from attack upon its validity; but such immunity may also result from inaction on the part of those who would contest the will, for by the express language of Section 19-255 (as amended by the Act of March 23, 1956, 49 Stat. at L. 1785) probate in common form becomes conclusive unless proceedings for proof in solemn form are commenced within six months thereafter. Since any other interpretation would lead to an unreasonable result, it would seem that by the use of the words "solemn form" in the proviso to Section 19-286 the legislature intended reference to the point at which by the laws of the foreign state the will should attain immunity from attack, rather than to the means by which such point of finality should be reached.

In Ohio, the validity of a will may be attacked only in an action for that purpose in the court of common pleas of the county in which the will has been admitted to probate. Ohio Revised Probate Code, Section 2741.01. And unless such an action is brought within six months after the admission of the will to probate (except where the contestant is under disability, in which case within six months after such disability has been removed), the probate is conclusive. Section 2741.09. Under the laws of Ohio, therefore, the will achieved immunity from attack upon its validity not by virtue of the probate itself but by reason of

the lapse of the statutory period limited for contesting it. McCord v. McCord (Ohio 1922), 135 N. E. 548; in re Frey's Estate (Ohio 1942), 139 Ohio St. 354, 40 N. E. (2d) 351; Peters v. Moore (Ohio (1950), 154 Ohio St. 177, 93 N. E. (2d) 683.

Aside from Section 1932.6 of our Code, we think that comity and due respect for the laws of a sister state require affirmance of the judgment here under appeal. And in this conclusion we are strengthened by the fact that the Ohio statute (Section 2107.48) forbids a proceeding in that state to contest a will executed and probated in another state.

Section 2107.13 of the Ohio Code provides that "no will shall be admitted to probate without notice to the surviving spouse and to the persons known to the applicant to be residents of the state who would be entitled to inherit from the testator * * * if he had died intestate." Appellant contends that this provision violates the due process clause in that it permits the will to be probated without notice of any kind to possible heirs residing, as he was, without the state of Ohio.

It is elementary that one whose rights have not been affected by a legislative act has no standing to attack its constitutionality. That principle is applicable here. Appellant admits that he had actual notice of the pendency of the probate proceedings in Ohio, and he does not suggest that such notice did not afford him ample opportunity to contest the jurisdiction of the court to entertain the application, Ohio Code, Section 2107.12, or to contest the validity of the will by an action in the court of common pleas of Cuyahoga County within the period limited by the Ohio statute for the commencement of such action. He makes no showing of impairment of his alleged right to notice, which is the sole ground of his charge of unconstitutionality; if by the alleged unconstitutional aspect of the statute the rights of others may be impaired, that is a matter with which appellant is not properly concerned, for he is the champion of his own rights only, not theirs. 11 Am. Jur., Constitutional Law, Section 111; Buchanan v. Warley, 245

U. S. 60, 30 S. Ct. 16, 62 L. Ed. 149; Kirk v. Douglass, 190 S. C. 495, 3 S. E. (2d) 536; Dillon County v. Maryland Casualty Co., 217 S. C. 66, 59 S. E. (2d) 640; Shipman v. DuPre, 222 S. C. 475, 73 S. E. (2d) 716.

But assuming that appellant had standing to raise the constitutional question, his contention is, in our opinion, without merit. Since it cannot be known with certainty what persons may have an interest at variance with the will, initial probate is in the nature of a proceeding in rem, seeking no personal judgment against anyone. 57 Am. Jur., Wills, Section 757; Goodrich v. Ferris, 214 U. S. 71, 29 S. Ct. 580, 53 L. Ed. 914; Thompson v. Anderson, 208 S. C. 208, 37 S. E. (2d) 581; Davis v. Davis, 214 S. C. 247, 52 S. E. (2d) 192; Caverno v. Webb (Ala. 1940), 196 So. 723; Miller v. Hill (Ky. 1943), 293 Ky. 242, 168 S. W. (2d) 769. Due process does not, in our opinion, require that the statute provide for notice to possible contestants in advance of such probate. Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 94 L. Ed. 865, cited by appellant in support of his contention as to this point, was concerned with proceedings for judicial settlement of a trustee's accounts. Covey v. Somers, 351 U. S. 141, 100 L. Ed. 1021, upon which he also relies, involved the foreclosure of a tax lien upon property known to be owned by an incompetent. Walker v. City of Hutchinson, 352 U. S. 112, 1 L. Ed. (2d) 178, also relied upon by appellant, was concerned with notice in a condemnation proceeding to a nonresident landowner. None of those cases had to do with the issue now under discussion, and we do not regard them as controlling or persuasive of that issue.

Nor do we think that Riley v. New York Trust Co., 315 U. S. 343, 86 L. Ed. 885, affords sound basis, under the facts of this case, for appellant's contention that he is not concluded by the Ohio probate. The Riley case was concerned with the situs, for tax purposes, of certain assets of a decedent's estate, and with the question of the conclusiveness of a Georgia decree adjudging that the decedent was at the time of her death domiciled in that state. The validity of the will was not in issue. The State of New York, claiming

that it was the state of domicile, procured the appointment of an administrator to protect its claim to inheritance and succession taxes. The assets in question consisted of stock of a Delaware corporation. The Georgia executors claimed the right to have the stock transferred to them on the books of the corporation; like claim was asserted by the New York administrator. The corporation then filed a bill of interpleader in a Delaware court to have these conflicting claims adjudicated. The Supreme Court of Delaware, rejecting the contention that it was concluded by the Georgia decree, held that New York was the state of decedent's domicile and directed the corporation to issue its stock certificate to the New York administrator. The Supreme Court of the United States, affirming, pointed out that the New York administrator was a stranger to the Georgia proceeding, and went on to say: "So far as the assets in Georgia are concerned the Georgia judgment of probate is in rem; so far as it affects personalty beyond the state, it is in personam and can bind only parties thereto and their privies * * *." Phrased somewhat differently, if the effect of a probate decree in Georgia in personam was to bar a stranger to the decree from later asserting his rights, such a holding would deny procedural due process.

Appellant relies also upon Scripps v. Durfee (Mich. 1902), 90 N. W. 1061; but the facts in that case were quite different from those here. There the testator, in 1894, had executed a will in Detroit, Michigan, then his legal domicile. In 1900 he died in California, where he had been temporarily residing. His executors, claiming that he had lived in Ohio for some time prior to his death, presented the will for probate in that state and it was there admitted to probate on July 2, 1900. On June 30, 1900, after the application for probate, but before the admission of the will to probate in Ohio, decedent's brother petitioned the probate court of Wayne County, Michigan, for the appointment of an administrator of decedent's estate, alleging: that that county was decedent's domicile at the time of his death and that he had left a large estate there, both real and personal; that if in fact decedent had executed the will

it was invalid because he was at that time mentally incompetent and unduly influenced by one of the beneficiaries of it; that petitioner had asked the executors to present the will for probate in Wayne County, Michigan, so that he and other heirs of the decedent might contest it; that they had refused to do so; and that the residuary legatees under the will had fraudulently conspired to have it probated in Ohio although it was well known to them that decedent's domicile was in Michigan. The probate court of Wayne County held that it was without jurisdiction to determine the question of decedent's domicile, or whether he died testate or intestate, until the will or a certified copy of it had been filed in that court by one claiming under the will, which petitioner was not. The Supreme Court reversed, holding: that the probate court of the testator's domicile had exclusive jurisdiction to determine the validity of the will; that if a will has been admitted to probate by a court having no jurisdiction the decree of that court might be binding as to property within its jurisdiction, but is not conclusive upon the courts of other jurisdictions; and that the probate court of Wayne County should proceed to determine whether decedent's domicile was in Detroit, and, if it should so determine, grant letters of administration unless the executors should choose to present the will for probate there. The question of the validity of the will was not before the court, and was not passed upon.

In the case at bar the issue of domicile was submitted to the Probate Court of Spartanburg County on affidavits and other documentary evidence; and that court held, by implication at least, that the testator's domicile at the time of his death was in Ohio. Appellant urges that this conclusion was clearly contrary to the preponderance of evidence on that issue. Assuming that appellant was such a stranger to the Ohio probate proceeding as to be entitled to raise the question of domicile in the South Carolina court, Riley v. New York Trust Co., supra, does not require that that issue be resolved in his favor. The Riley case simply held that the full faith and credit clause does not render a probate decree in one state as to domicile con-

clusive, in the courts of another state, against a stranger to that decree, in an action involving assets in such other state. Here the evidence as to domicile was conflicting, much of it on both sides being in the form of affidavits by persons interested in the result of the litigation. The testator's own declaration, in his will made less than a month before his death and evidently during his last illness, that he was "of Cuyahoga County, State of Ohio," and only "temporarily residing in Spartanburg County, State of South Carolina", was entitled to consideration. We are unable to agree with appellant in his contention that the court's holding as to domicile was clearly contrary to the preponderance of the evidence. Moreover, as we have before stated, appellant had actual notice of the pendency of the Ohio probate proceedings. In the face of such knowledge he refused or neglected to appear and avail himself of his right to contest the jurisdiction of the probate court to entertain the application for probate, or of his right, within six months after the admission of the will to probate, to attack its validity as provided in the Ohio statute. He does not occupy, in a true sense, the position of stranger to the Ohio proceedings. Robbins v. Chicago, 71 U. S. 657, 18 L. Ed. 427.

We note, too, that the procedure sought to be invoked by appellant was proof of the will in due form of law under our Code Section 19-256. By the terms of that statute such procedure is concerned not with the question of domicile, but only with the question of whether or not the will is a valid one. Under the facts of this case the lower court properly held that so far as the validity of the will was concerned the Ohio probate became conclusive as to appellant upon the expiration of the period limited by the laws of Ohio for contesting it. Such holding did not preclude the Probate Court of Spartanburg County from retaining ancillary jurisdiction in respect of assets of the estate located in South Carolina. Its retention of such jurisdiction was entirely proper.

Appellant contends that the lower court improperly held that the decedent was seized of no real estate in South Carolina at the time of his death, thereby ignoring or prejudging the action pending by appellant against respondent to set aside for mental incapacity and undue influence decedent's deed, executed shortly before his death, purporting to convey to her his South Carolina real estate. But we find nothing in either the probate or the circuit court decree that in our opinion warrants such conclusion. As mentioned in the probate decree, the deed, though under legal attack, must be regarded as valid until adjudged otherwise; and the circuit decree correctly stated that "the record shows that the decedent was not seized of any real estate in South Carolina at the time of his death." Neither statement purports to prejudge, or is to be construed as prejudging the pending action.

Affirmed.

Taylor, C. J. Moss, Lewis and Bussey, JJ., concur.

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 356

IN RE: ESTATE OF RAYMOND B. TRIPP, DECEASED

WILLIAM A. TRIPP, PETITIONER,

versus

IRENE F. TRIPP, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CONTENTS

	Page
Index of Cases	ii
Questions Presented	1
Additional Statutes Involved	2
Statement of the Case	4
Argument	6
Conclusion	13

INDEX OF CASES CITED

PAGE

Ellis v. Davis, 3 S. Ct. 327, 109 U. S. 485, 27 L. Ed. 1006 7

Elvin, In re Will of, 146 O. S. 448, 66 N. E. (2d) 629 8

Hanson v. Denckla, 78 S. Ct. 1228, 357 U. S. 235, 2 L. Ed. (2d) 1283 11

Irving Trust Co. v. Day, 62 S. Ct. 398, 314 U. S. 556, 86 L. Ed. 452, 137 A. L. R. 1093 ..... 7, 8

Peters v. Moore, 154 O. S. 177, 93 N. E. (2d) 683 5

Pettit v. Morton, 28 App. 227, 162 N. E. 627 7

Tyler v. Judges of the Court of Registration, 21 S. Ct. 206, 179 U. S. 405, 45 L. Ed. 252 13

Tyson v. Scott, 116 Va. 243, 81 S. E. 57 7

United States v. Perkins, 16 S. Ct. 1023, 163 U. S. 625, 41 L. Ed. 287 9

STATUTES CITED

South Carolina Code (19-286) 5, 11

Ohio Revised Code (2107.61) 4, 7

Ohio Revised Code (2101.12; 2101.14) 2, 3, 8

Ohio Revised Code (2107.12) 12

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TO THE SUPREME COURT OF SOUTH CAROLINA

Irene F. Tripp, in opposition to petitioner's request for a Writ of *Certiorari* to review the judgment of the Supreme Court of South Carolina entered June 1, 1962, submits the following data:

QUESTIONS PRESENTED

1. A proceeding to probate a will being "*in rem*," does Ohio Probate Code, which does not require notice to de-

cedent's non-resident heirs, deprive those expectant heirs of property rights without due process of law?

2. Was not the State of South Carolina free to recognize the Ohio probate decree and accord it conclusive effect?

3. In view of Ohio statute permitting contest of the Probate Court's jurisdiction upon a will being presented for probate, is a party interested against the will denied due process of law by having to admit the original probate jurisdiction on contesting the validity of the will in the higher trial court?

4. Does petitioner, who had full knowledge of the probate proceedings, have standing to challenge the constitutionality of Ohio's probate procedures with respect to written notice?

ADDITIONAL STATUTES INVOLVED

In addition to the constitutional provisions and statutes to which petitioner refers in his brief, the following sections of the Revised Code of Ohio, or pertinent portions thereof, appear below:

2101.12. What books shall be kept by probate court:

The following books shall be kept by the Probate Court:

(A) • • •

(B) An administration docket, showing the grant of letters of administration or letters testamentary, the name of the decedent, the amount of bond and names of sureties therein, a minute of the time of filing each paper, and a brief note of each order or proceeding relating to the estate with reference to the journal or record in which the order or proceeding is found;

(C) • • •

(D) A civil docket, in which shall be noted the names of parties to actions and proceedings, a minute of the time of the commencement of such actions and

proceedings and of the filing of the papers relating thereto, a brief note of the orders made therein and the time of entering them;

(E) A journal, in which shall be kept minutes of official business transacted in the probate court, or by the probate judge, in civil actions and proceedings;

(F) A record of wills, in which the wills proved in such court shall be recorded with a certificate of the probate thereof, and wills proved elsewhere with the certificate of probate, authenticated copies of which have been admitted to record by the court;

(G) * * *
(H) * * *
(I) * * *
(J) * * *
(K) * * *
(L) * * *
(M) * * *
(N) * * *

To each record required by this section, an index shall be attached and securely bound in the volume. Each index shall be kept current with the entries therein and shall refer to such entries alphabetically by the names of the persons as they were originally entered, indexing the page of the book where the entry is made. On the order of the judge, blankbooks for such records and indexes shall be furnished by the board of county commissioners at the expense of the county.

2101.14. **Care and preservation of papers; time stamp.**

All pleadings, accounts, vouchers, and other papers in each estate, trust, assignment, guardianship, or other proceeding, *ex parte* or adversary, which are filed in the probate court shall be kept together, and upon the final termination or settlement of such case, cause, or proceeding shall be preserved for future reference and examination. Such papers shall be properly jacketed, and otherwise tied, fastened, or held together, numbered, lettered, or otherwise marked in such manner that they may be readily found by reference to

proper memoranda upon the docket, record, or index entries thereof, which memoranda shall be made by the probate judge. Certificates of marriage, reports of births and deaths, and similar papers not part of a case or proceeding, shall be arranged and preserved separately in the order of their dates or in which they were filed. As used in this section "case" or "cause" includes all proceedings in the settlement of any estate, guardianship, or assignment, except as provided in section 2101.141 of the Revised Code.

The probate court shall provide a time stamp and shall stamp on all papers filed in said court the day, month, and year of the filing thereof.

2107.61. **Will ineffectual.**

Unless it has been admitted to probate or record, as provided in sections 2107.01 to 2107.62, inclusive, and 2129.05 to 2129.07, inclusive, of the Revised Code, no will is effectual to pass real or personal estate.

STATEMENT OF THE CASE

Respondent's husband, Raymond R. Tripp, who was petitioner's father, died in Tryon, North Carolina, on April 9, 1959. Decedent left a will, (R. 10) stating that he was of Cuyahoga County, State of Ohio, "temporarily residing in Spartanburg County, State of South Carolina." The will named respondent as sole beneficiary of the estate and nominated her as executrix.

Respondent offered the will for probate in the Probate Court for Cuyahoga County, Ohio, the place designated by decedent's will as his domicile. On May 14, 1959, the Ohio Probate Court allowed the will to probate and entered its probate order in the Court journal. (R. 15 and 16.) By Section 2101.12 of the Ohio Revised Code, the will was required to be recorded in the Court's record of wills with a certificate of the probate thereof, and an alphabetical index of all record entries is maintained in such Court. In addition to constructive notice given by Court records,

petitioner had actual knowledge of the probate prior to expiration of the contest period. (R. 21.) Notwithstanding, petitioner elected not to contest the will in Ohio within the six months period allowed by Section 2741.09 of the Revised Code of Ohio, and such probate became final. *Peters v. Moore* (Ohio, 1950), 154 Ohio St. 177, 93 N. E. (2nd) 683.

After the will had attained immunity from attack in Ohio, and after respondent refused petitioner's request to offer an exemplified copy of the will to probate in Spartanburg County, South Carolina, the petitioner obtained common form probate of the will in the Probate Court for Spartanburg County upon exemplification thereof with the attached certificate of the Ohio Probate Court as to probate in that State. Petitioner conceived that Section 19-286 of the South Carolina Code of Laws (1952), which permitted probate of foreign wills in South Carolina upon exemplification, also gave him the right to contest the will in the South Carolina Courts, and to that end respondent was cited by the Probate Court for Spartanburg County to prove the will in "solemn form" (the first phase of a will contest according to South Carolina procedure). Appearing specially before the South Carolina Probate Court, respondent contended that the South Carolina Court was without jurisdiction to entertain a will contest since the foreign Ohio probate was conclusive under Section 19-286 of the South Carolina Code. After receiving evidence as to decedent's domicile, the Probate Court for Spartanburg County assumed jurisdiction for the purpose of granting ancillary administration, as to South Carolina assets, but construed the South Carolina statute governing probate of foreign wills as denying a will contest in South Carolina Courts whenever the foreign probate decree had attained immunity from attack in the jurisdiction wherein it was

issued. By implication, at least, the Spartanburg County Probate Court found, on the basis of the evidence received, that Ohio was decedent's domicile, as it was so stated in his will. On intermediate appeal to the Common Pleas Court of Spartanburg County, and final appeal to the South Carolina Supreme Court, the factual finding of the Probate Court as to domicile, and its interpretation of the applicable South Carolina statute, have met with concurrence.

Throughout the litigation, and notwithstanding the South Carolina Statute requiring recognition of and conclusive effect to foreign probate of wills, petitioner has repeatedly, but unsuccessfully, contended that the Ohio decree of probate should not, or could not, be recognized by South Carolina Courts since Ohio law did not require, nor did petitioner receive, any written notice of the pendency of the Ohio probate proceeding; which absence of notice, it is argued, results in a denial of due process of law and renders the Ohio probate decree a nullity under the Fourteenth Amendment of the United States Constitution. This is petitioner's claim to substantiality of a federal question on which he now seeks review of the decision of the South Carolina Supreme Court.

ARGUMENT

1. A proceeding to probate a will being one "in rem", the Ohio Probate Code, which does not require notice to decedent's nonresident heirs, does not deprive those expectant heirs of property rights without due process of law.

Historically, and by their very nature, there is no other legal proceeding comparable to a probate proceeding. Of necessity, initial probate is an *in rem* proceeding, for it cannot be ascertained in advance who might be interested against the will and no personal judgment is sought against anyone. The written instrument is the "*res.*" The Probate

Court is concerned only with the simple question, whether the paper offered in the last will and testament of the deceased, and cannot extend its jurisdiction further in an effort to ascertain and enforce rights in property. The Probate Court, in the probate proceeding, confines itself to the establishment, preservation and perpetuation of an important muniment of title. *Tyson v. Scott*, 116 Va. 243, 81 S. E. 57. It is no sense an *"in personam"* proceeding, but strictly *"in rem,"* seeking no judgment against anyone, and is not subject to due process requirements relative to notice.

Nor did the probate decree deprive petitioner of any rights. Contrary to petitioner's contention that he has a "right to inherit", it is universally recognized that he had no such right. The most he had was an expectancy, or hope of succession, either by will or intestacy. Only by sufference of the States of Ohio and South Carolina could he have even an expectant interest. *Irving Trust Company v. Day*, 62 S. Ct. 398, 314 U. S. 556, 862 ed. 452, 137 A. L. R. 1093.

And since a will is a mere piece of paper conferring no right or title until infused with the blood of probate, petitioner's rights to succession were not determinable until the Ohio Probate Court issued its probate decree, and only after then did rights capable of being contested arise. *Pettit v. Morton*, 28 App. 227, 162 N. E. 627; *Ellis v. Davis*, 109 U. S. 485, 3 S. Ct. 327, 27 L. Ed. 1006. Until probated, according to the law of Ohio, the will had no legal standing as a basis for a suit in any court. Ohio Probate Code, Section 2107.61. Even while respondent's application for probate in Ohio was pending, only the hopes and expectations of petitioner were in suspense, for he had no rights to be deprived of. The dead hand could rule succession, and did.

The constitution requires due process with respect to rights, not expectancies which do not ripen into rights. And when a disappointed heir is given the statutory privilege to timely contest the validity of a duly probated and recorded testamentary instrument, which may have frustrated his hopes and expectations, he is in no position to complain of denial of due process simply because he received no notice that the initial probate proceeding was pending and there would be a hearing thereon. Indeed, in Ohio, as in most states, the preliminary probate is a non-adversary proceeding which results in probate upon the proponent making a *prima facie* case, even though there may be conflicting evidence. *In re Will of Elvin*, 146 OS 448, 66 N. E. (2d) 629.

The records of the Cuyahoga County Probate Court showed the probate of the decedent's will, which was required to be entered in the record of wills and index maintained. Ohio Probate Code, Sections 2101.12 and 2101.14. The obvious object of the Ohio Statute requiring such comprehensive records in the Probate Court was to furnish notice to purchasers, subsequent encumbrancers and others interested as to the status of decedents' estates. Petitioner, as an obviously interested party, must be charged with constructive notice of these court records which showed that his father died testate. He was free to contest the will within six months, but purposefully and deliberately refused to take such action.

Only by statute may rights to succession, either by will or intestacy, accrue. State legislatures are free of any federal constitutional prohibitions in fixing the terms and conditions under which a will may be made, and may limit or even abolish the power of testamentary disposition of property within its dominion. *Irving Trust Company v. Day, infra.* A state may annex to the grant to make a will

any condition which it conceives to be to its best interest. *United States v. Perkins*, 16 S. Ct. 1073, 163 U. S. 625, 41 L. Ed. 287, and to that end, may exclusively control the method and manner under which a will may be given effect by probate or rendered ineffectual by contest. The State legislature is free to give directions to courts of probate as to when a will shall be allowed or disallowed as a testamentary document. According to the policy adpoted by the State, the initial probate proceeding may or may not be of an adversary nature, and as a prerequisite to probate jurisdiction, it may be necessary for the proponent of the will, or the court, to first give written notice to some or all of the known interested parties, either by mail[1] or publication,[2] or a combination of the two.[3] In many states, no written notice is required,[4] or it may be discretionary with the court.[5] And even where publication and written notice of the probate application is required, it is purely jurisdictional and the statutory requirements thereabout do not rob the probate proceeding of its "*in rem*" character.

Legislatures, in allowing and regulating testamentary dispositions, and by prescribing probate procedures, have established a method by which title to property shall pass. The testamentary instrument is preserved as a muniment of title and serves as a basis for ownership. For generations, State governments have regarded probate law as within its peculiar province and legislative bodies have dealt with the subject on that premise. There is no suggestion that the numerous and various methods for the

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[1] By mail: Nevada, Rhode Island, Utah, Wisconsin and Wyoming.

[2] Publication: Arkansas and Nebraska.

[3] Combination: California, Michigan, Missouri, North Dakota and South Dakota.

[4] No Notice: Mississippi, North Carolina, Pennsylvania, South Carolina, Tennessee, Vermont, Virginia and West Virginia.

[5] Discretionary Notice: Connecticut, Maryland, New Hampshire.

preliminary probate of wills have been devised with the idea that the Federal Constitution is applicable, as the primary legislative aim at that point is to insure that the instrument propounded is the will of the decedent and that it meets the particular statutory tests as to execution and attestation to qualify for probate; according to the thinking of many legislatures, this objective may be accomplished in an *ex parte* proceeding.

If this Court should now declare that the "due process" clause applies to initial probate proceedings, and applies the Federal Constitution so as to invalidate probate decrees obtained without prior written notice to interested persons, many titles founded on testamentary instruments will collapse all over the nation, and interminable litigation will arise in many of the United States. Real estate titles assumed to have passed under certain wills would probably not be marketable. This Court cannot ignore the fact that the integrity and stability of ownership and land titles is at stake in many States which have minimal or no notice requirements prior to probate.

Duly probated wills which have been admitted to record can only be challenged according to the prescribed statutory procedure, and practically every state limits the time in which a contest may be commenced. The policy of most states favors an early settling of estates, and this is done through statute imposing a limitation on actions. Petitioner apparently does not quarrel with the Ohio statute which requires a contest to be commenced within six months after admission to probate, but attacks the preliminary Ohio probate as constitutionally void *ab initio* and of no effect.

2. South Carolina was free to recognize the Ohio probate decree and accord it conclusive effect.

South Carolina does not recognize and give effect to a foreign probated will under compulsion; but by legislative choice. Section 19-286, South Carolina Code of Laws, 1952. The Federal Constitution contains no mandate that states shall allow probate to foreign wills. Again, this is a matter to be decided by the state legislature in exercising power over testamentary disposition of property. The magnitude of this power has been previously discussed.

If, in the interest of comity, a state accords conclusive effect to a probate decree which has attained immunity from attack in the foreign jurisdiction, it has gratuitously acted within the spirit of the Full Faith and Credit Clause. This is certainly unlike the case of *Hanson v. Denckla*, 78 S. Ct. 1228, 357 U. S. 235, 2 L. Ed. (2d) 1283, where the decisions of the Delaware and Florida Courts were in conflict and resulted in a dispute over which state could control the disposition of assets. Here, both states agree that there shall be a testamentary disposition of assets, under the provisions of same will, and no problem is presented with respect to construction and operation of the instrument.

Petitioner is trying to bring about conflicting dispositions of the estate, that is, testate in Ohio and intestate in South Carolina.

3. In view of Ohio Statute permitting contest of the Probate Court's jurisdiction upon a will being presented for probate, a party interested against the will is not denied due process of law by having to admit the original probate jurisdiction on contesting the validity of the will in the higher trial court.

Though the above question has not been passed upon by the South Carolina Supreme Court, or the issue clearly

raised, petitioner now asks this Court to review the case on this ground. According to long established rule, no review may be had on matters not raised or passed upon below.

Petitioner contends he has no forum in Ohio to contest the validity of the will without admitting the original jurisdiction of the Probate Court. But the provisions of Section 2107.12 of the Ohio Probate Code refute his contention, for it is there provided that a person interested may contest the jurisdiction of the Probate Court when a will is presented for probate, and the Probate Court shall, after notifying various parties, conduct a hearing and make a decision. The decision of the Probate Court as to jurisdiction is reviewable.

With this statutory procedure, it is difficult to conceive how petitioner has been compelled to forego his privilege to raise any type of jurisdictional question in Ohio, or to raise the issue of decedent's domicile. He could have contested jurisdiction under the Ohio Statute, and if that resulted in an adverse decision, he could have thereafter contested the validity of the will. The six months limitation on bringing the contest would not commence to run until after the jurisdictional question was resolved.

4. Petitioner having had full knowledge of the probate proceedings, he has no standing to challenge the constitutionality of Ohio's probate procedure with respect to written notice.

Petitioner's rights have in no way been impaired by operation of the Ohio Statute under attack. Having possessed actual knowledge of the Ohio proceedings prior to the expiration of the contest period, failure to receive written notice was of no consequence. Petitioner only has standing to protect his own interests. There is no suggestion that there are other non-resident heirs who received

no notice, but even if there were, he has no right to litigate in their behalf and thereby bring before the Court a non-reviewable hypothetical question.

The case of *Tyler v. Judges of the Court of Registration* (1900), 21 S. Ct. 206, 179 U. S. 405, 45 L. Ed. 252, is remarkably similar. There, petitioner challenged certain provisions of the Massachusetts Torrens Law which, in a registration proceeding, required only conspicuous posting of notice as to residents and known persons, and publication as to unknown parties. Petitioner, who owned land adjoining that sought to be registered, disputed the boundary and complained that the rights of parties may be foreclosed without actual notice to them, and without actual knowledge of the proceedings. In refusing petitioner's contention, the Court stated:

> "His objections throughout assume that he has actual knowledge of the proceedings, and may make himself a party to them and litigate the only question, namely, of boundaries, before the Court of Registration. In other words, he is not affected by the provisions of the Act of which he complains, since he has the requisite notice. Other persons, whether residents or non-residents, whose rights might be injuriously affected by the decision, might lawfully complain of the unconstitutionality of an act which would deprive them of notice; but it is difficult to see how the petitioner would be affected by it. Indeed, if the act was subsequently declared to be unconstitutional, the proceedings against him would go for naught. He would have lost nothing since the action of the Court would simply be void, and his interest in the land would remain unaffected by its action."

CONCLUSION

Petitioner fails to present any substantial Federal question to warrant review of this case. The State of South Carolina, in the exercise of its plenary power to permit

and control testamentary dispositions, has allowed the foreign will to probate upon exemplification, and accorded the Ohio probate decree conclusive effect.

The South Carolina Supreme Court has ruled, in accordance with established principles of law, that petitioner has no standing to attack the constitutionality of the Ohio statute in question; and even if he did, that an *in rem* proceeding to probate a will is not subject to due process requirements so as to entitle petitioner to written notice of the probate application.

Petitioner also had constructive notice that his father died testate through the records of the Ohio Probate Court. No rights capable of contest arose until decedent's will was allowed to probate, and indeed, petitioner never had a "right to inherit" subject to deprivation, but only an expectancy.

In conjunction with the power of a State legislature to allow, limit or abolish testamentary dispositions, it also possesses the power to establish probate procedures to satisfy the broad policies of the state in regard to testate succession to property. The Federal Constitution does not interfere with these state policies, and if the legislature conceives that an *ex parte* proceding affords sufficient basis for its courts to determine the validity of a will which it alone allows, it may constitutionally pass such a statute. To now declare the Due Process Clause of the Federal Constitution applicable to preliminary probate proceedings would greatly disturb the stability of property ownership and titles to real estate. No substantial federal question is presented for review by this Honorable Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 356

In re. ESTATE OF RAYMOND B. TRIPP, Deceased

WILLIAM A. TRIPP,
Petitioner,

vs.

IRENE F. TRIPP,
Respondent

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

	Page
Statement of the Case	1-2
Argument	2-7
1. Nature of Probate Proceedings described as being one "in rem" does not eliminate proper notice to non-resident heirs under due process requirements of Mullane case	2-4
2. South Carolina Courts are not bound by the Ohio Probate Decree where there is a question of jurisdiction over the subject matter and person	5
3. Section 2107.12 of the Ohio Probate Code permitting a contest on the jurisdiction of the probate court at the time of presenting the will to probate does not apply to Petitioner who did not have notice of the presentation of the will for probate	5-6
4. Mere knowledge of a probate proceedings does not waive the legal requirement of written notice under the due process clause	6-7
Conclusion	7-8

INDEX TO AUTHORITIES CITED

Burbank v. Ernst, 232 U.S. 162, 58 L. Ed. 551, 345 Ct. 299	5
Hines v. Cowles, 18 Ohio Cir. Ct. (N.S.) 518; affirmed 86 Ohio St. 350	5
Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 94 L. Ed. 865, 703 Ct. 652	2-3
Scholl v. Scholl, 123 Ohio St. 1, 173 N.E. 705	6
Stacey v. Cunningham, 69 Ohio St. 176, 67 N.E. 292	6
Wuchter v. Pizzutti, 276 U.S. 13, 48 S. Ct. 250, 72 L. Ed. 446	6

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner replies herein to Respondent's Brief in Opposition to the Petition for Writ of Certiorari in the same order of propositions as presented in Respondent's Brief.

STATEMENT OF THE CASE

First, petitioner desires to correct the inference contained in respondent's brief (pp. 5 and 6) to the effect that the South Carolina Courts examined the evidence submitted

to the Probate Court on the question of domicile and decided the domicile question from such evidence. The order of the Probate Court shows it did not consider or reach any conclusion from the evidence, since it held it is bound by the order of the Ohio Probate Court admitting the will to probate (R. 32).

The Common Pleas Court of South Carolina agrees with the Probate Judge that the Ohio decree was conclusive on domicile in Ohio and that the courts of South Carolina have no authority to reach a different conclusion (R. 37). It did not, in any way, discuss the evidence relative to such domicile question.

Although the South Carolina Supreme Court made a reference to some statements in the evidence on domicile being conflicting, this was unnecessary in view of its affirmance of the decisions of the two lower courts that the South Carolina Courts are bound by the Ohio proceedings admitting the will.

ARGUMENT

1. Nature of Probate Proceedings described as being one "in rem" does not eliminate proper notice to non-resident heirs under due process requirements of Mullane case.

Respondent's Brief asserts the proposition that a proceeding to probate a will is one "*in rem*" and therefore does not require notice to decedent's non-resident heirs such as petitioner. She states (p. 7) that such a probate proceedings is not subject to due process requirements relative to notice.

However, such a proposition disregards the basic principles established in *Mullane v. Central Hanover Bank and*

Trust Co., 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 to the effect that due process in any proceedings which is accorded finality requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pending action and afford an opportunity to be heard. No distinction is made between "*in rem*" and "*in personam*" by the court. In fact on page 313 the U.S. Supreme Court says:

> "* * * whatever the technical definition of its chosen procedure, the interest of each state in providing means to close the trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or non-resident. * * *"

The "interest" of the claimant is nonetheless one which is protected by such notice whether or not it is called an "expectancy", "right to inherit" or some other title for the Ohio probate order admitting the will has the effect of cutting off petitioner's claim to decedent's property. This is a very real and definite property interest on the part of petitioner which is lost. Such action taken without notice to petitioner deprives him of a right to cross-examine witnesses and be heard in opposition to the application in Ohio.

In the *Mullane Case* personal service by mail to known beneficiaries of a known place of residence was required. Statutory publication was not enough for due process to such persons and respondent's reference to the records of Cuyahoga County Probate Court (p. 8) is even less satisfactory for notice of the probate application to petitioner, a non resident whose address is known. As stated in the *Mullane* case the reasons disappear for use of anything

less than the mails to apprise interested parties of a pending action when the names and post office addresses of those affected by a proceedings are available. This was not done by the Ohio Probate Court because the Ohio statute did not require it.

When the defendant's address is known the method of notice most likely to give actual knowledge of the proceedings without unduly hampering the courts should be required. Notice by regular mail in addition to publication would seem to accomplish this. Furthermore, there is no reason to distinguish between residents and non residents, the latter having as much right to protect their interests, and therefore to reasonable notice as residents. Notice by mail could reach either with equal ease. A distinction between "*in rem*" and "*in personam*" is similarly unjustified as the necessity for notice to a non resident heir-at-law is just as great as a resident heir-at-law. If anything, there is greater need for notice to the non resident heir.

It is unfortunate that some states have not brought their legislation regarding notice to interested parties into conformity with the *Mullane* doctrine. Both South Carolina and Ohio are examples of two states that have not done so. It is respectfully submitted that this is the time to correct this situation by declaring that part of the Ohio statute invalid under the due process clause where no provision is made for notice to a non resident heir-at-law of a decedent in a probate proceeding to admit a will to probate.

2. South Carolina Courts are not bound by the Ohio Probate Decree where there is a question of jurisdiction over the subject matter and person.

Respondent relies upon a South Carolina statute permitting recognition of a foreign probate will. However, this statute does not apply where the foreign decree or judgment lacks facts necessary to give that Court jurisdiction. Want of jurisdiction may be shown as to either the subject matter or the person.

Where the jurisdiction to probate a will depends upon the domicile of the deceased at the time of his death the finding of a probate court that such domicile was in its state does not bind the probate court of another state where the probate of the same will is sought. *Burbank v. Ernst*, 232 U.S. 162, 58 L. Ed. 551, 345 Ct. 299. See other cases cited on page 49 of petition. Even the Ohio courts have held that the decisions of its probate courts in probating wills bind Ohio courts only and not courts in any other state. *Hines v. Cowles*, 18 Ohio Cir. Ct. (N.S.) 518; affirmed 86 Ohio St. 350.

3. Section 2107.12 of the Ohio Probate Code permitting a contest on the jurisdiction of the probate court at the time of presenting the will to probate does not apply to Petitioner who did not have notice of the presentation of the will for probate.

Respondent's reference to this provision of the Ohio statute does not help petitioner because he had no notice of the application or presentation of the will for probate. In fact Ohio provides for no notice at all to non resident heirs at any time in a probate proceedings—even during the six month's period that such an interested person could

contest the admission of a will. Actually petitioner learned about the will after the will had been admitted and the jurisdictional question presumably passed upon. Hence if petitioner wanted to contest the will, he had to waive the question of probate court jurisdiction. *Stacey v. Cunningham*, 69 Ohio St. 176, 67 N.E. 292. This is not due process of law as outlined in the second proposition of the petition (page 15).

4. Mere knowledge of a probate proceedings does not waive the legal requirement of written notice under the due process clause.

Respondent as a final argument says that petitioner had actual knowledge of the probate proceedings prior to the expiration of the six month contest period and therefore receiving written notice would be of no consequence. It is a basic concept of our jurisprudence that jurisdiction over the subject matter and the person is necessary. Although a defendant may have full knowledge that an action has been commenced against him, a court nevertheless lacks jurisdiction to enter a judgment against him unless jurisdiction over the person has been obtained in compliance with the law designating the method of obtaining such jurisdiction. *Wuchter v. Pizzutti*, 276 U.S. 13, 48 S. Ct. 259, 72 L. Ed. 446. See also, *Scholl v. Scholl*, 123 Ohio St. 1, 173 N.E. 305.

The lack of providing notice to non resident heirs whose addresses are known in the Ohio statute is nonetheless a due process objection which is contrary to the requirements set out in the *Mullane* decision. Mere knowledge of the pendency of the probate proceedings in the absence of an appearance or a written waiver does not remove the objection. Actually, petitioner did not learn of the probate

proceedings until after the will had been admitted to probate. Then his choice of contesting the will so admitted in a separate court required a waiver of the jurisdiction question in the probate court, *Stacey v. Cunningham, supra.*

Under such circumstances this is not due process of law and petitioner has been deprived of an opportunity to be heard and cross-examine witnesses at the hearing on the application for admission of the will to probate.

CONCLUSION

For the reasons heretofore stated in his Petition and this Reply, Petitioner respectfully urges this Honorable Court to grant a writ of certiorari to review the proceedings of the South Carolina Supreme Court and the lower courts. Only by granting the writ can the undisputed facts indicating decedent's domicile in South Carolina be established rightfully and petitioner eventually be given an opportunity to be heard on the question of decedent's mental capacity to make a will. Also the exercising of such discretionary power on the part of the United States Supreme Court will make possible the application of the *Hultane* doctrine of notice to the field of probate law and administration in a very significant and helpful manner. Too many states have disregarded or unduly limited its scope. By indicating the extent and manner of notice required for non resident heirs whose address is known in a probate proceedings, this court can assist materially in creating stability and certainty in the devolution of testate and intestate property, both real and personal, throughout the country. Petitioner respectfully hopes that this Honorable Court will not pass over this opportunity in its crowded

calendar to do justice in this case and determine the constitutional questions involved.

Respectfully submitted,

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